decline to adjust the rights of third parties on that basis.[3] New York, however, has consistently applied it to all the situations which have arisen, except where the thing attached had become so merged in the land as to lose its identity.[4]

In a recent case in the Court of Appeals, one who purchased an engine, subject to the agreement that it should remain personalty until the purchase price was paid, attached it to land of which he was in possession under a contract of purchase containing a provision that whatever machinery should be attached to the land should become realty. The court permitted the seller of the chattel to recover the unpaid purchase price from the vendor of the realty. *Davis* v. *Bliss*, 187 N. Y. 77. This situation seems to test the soundness of the New York doctrine. It is evident that the person whose agreement can preserve to a fixture its character as a chattel is not the owner of the chattel, but the occupier of the land, who is to annex the chattel.[5] If, then, that person has previously contracted with the owner of the land that the thing shall not retain its character as a chattel, the court is placed in the embarrassing position of deciding which of these promised results has been achieved;[6] or else, since the two agreements are inconsistent, of refusing to consider either as affecting the character of the property. The only possible guide to a choice between the agreements would be the actual intent of the annexor. But the danger in permitting such a person to elect which of the two others shall be preferred is sufficiently apparent. If neither agreement is regarded, the rules applicable under normal circumstances determine the thing to be a part of the land. Therefore, if the rights of the seller of the chattel are to be contingent on its remaining a chattel, this doctrine carried to a logical conclusion must deny him any relief. But fairness demands that he be protected. He has parted with possession of his chattel on conditions to which the law usually gives effect. The vendor of the land, on the other hand, cannot properly demand as security for his purchase price anything more than his vendee equitably had in the thing,[7] — that is, an equity of purchase in the engine. It is believed that the desirable result of the present case may best be achieved by a return to the older principles of our law. After determining whether or not a thing has lost its character as a chattel, in accordance with rules to be uniformly applied regardless of personal agreements,[8] those inequitable situations which arise may be adjusted according to recognized equitable principles.[9]

LIABILITY OF PARTIES TO LOST PROMISSORY NOTES. — The loser of a promissory note, if he wishes to fix the liability of an indorser, must, as usual, make demand on the maker at maturity and give prompt notice to the indorser.[1] Whether he must simultaneously tender a bond of indemnity

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[3] Richardson *v.* Copeland, 72 Mass. 536; Wickes *v.* Hill, 115 Mich. 333.
[4] Holmes *v.* Tremper, 20 Johns. (N. Y.) 29; Ford *v.* Cobb, 20 N. Y. 344.
[5] Jermyn *v.* Hatch, 93 N. Y. App. Div. 175.
[6] See McCrillis *v.* Cole, 25 R. I. 156.
[7] Campbell *v.* Roddy, 44 N. J. Eq. 244; Hurxthal *v.* Hurxthal, 45 W. Va. 584.
[8] Reynolds *v.* Ashby, [1904] A. C. 466; Fifield *v.* Farmers' Bank, 148 Ill. 163. See Prescott *v.* Wells, 3 Nev. 82, 89.
[9] Bringholff *v.* Munzenmaier, 20 Ia. 513; Davenport *v.* Shants, 43 Vt. 546.

[1] Hinsdale *v.* Miles, 5 Conn. 331.

to the maker is not so clear. If the lost note is of such a character that equities will be cut off if it reaches a *bona fide* purchaser, the law is well settled that a demand must be accompanied by such tender. Otherwise the maker, though free from any fault, might be compelled to pay a second time and be relegated to his remedy against the possibly insolvent loser.[2] If, however, equities would not be cut off, because the note when lost was over-due, or unindorsed, or indorsed specially, there is a conflict as to whether tender of a bond is necessary. It is true that in such a case the maker would be under no obligation to pay the note when presented; but nevertheless he would be at the mercy of an unscrupulous loser who might misstate the condition of the instrument when lost, and in any event he might be subjected to a suit by the later holder, the expenses of defending which should be borne by the loser of the note. It is submitted, therefore, that to make refusal on demand wrongful, an offer of a bond of indemnity, or its equivalent, should in all cases accompany the demand.[3] The maker will of course remain liable, even though the demand was invalid, until the statute of limitations has run.[4] An action at law is permitted in jurisdictions which so merge law and equity that proper protection by way of indemnification can be given the defendant in such action.[5] In any event there will be the basis for a bill in equity.[6]

As to the indorser, however, since he, being liable only secondarily, is not bound to pay unless the maker is in default, the question whether a bond is necessary is very material. If it is agreed that the maker is never in default without tender of security, then of course the indorser is completely absolved. Assuming, however, that security is tendered the maker, or that the question arises in a jurisdiction which regards the maker's refusal to pay as wrongful though no bond be tendered, clearly the indorser stands as much in need of the protection of a bond as the maker. Indeed, what scant authority there is upon the point is to the effect that the indorser can in no event be held, either on the note[7] or on the original consideration,[8] because he needs the instrument for his remedy over against the maker. This solution seems undesirable and unnecessary. The loser should be allowed to join all parties on the note in equity, where a decree could be had that he be paid by the maker if solvent, or by the indorser if the maker were insolvent. The loser, for his part, should be required to give a bond of indemnity broad enough to protect all parties not only from loss by a second payment, but also from expenses arising from maintaining or defending a possible later action.

If the indorser, though not in default, agrees with knowledge of the facts to pay the loser, it is generally held, without much regard for the difficulty as to consideration, that the loser may enforce the agreement.[9] If, as in a

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[2] See 2 Daniel, Neg. Inst., 5 ed., §§ 1480, 1481, and cases cited.

[3] Wade *v.* New Orleans Canal, etc., Co., 8 Rob. (La.) 140; Welton *v.* Adams & Co., 4 Cal. 37. *Contra*, Citizens Nat'l Bank *v.* Brown, 45 Oh. St. 39. *Cf.* 11 HARV. L. REV. 125. See also First Nat'l Bank of Denver *v.* Wilder, 104 Fed. Rep. 187.

[4] Greeley *v.* Whitehead, 35 Fla. 523.

[5] Fales *v.* Russell, 16 Pick. (Mass.) 315; First Nat'l Bank of Denver *v.* Wilder, *supra.*

[6] Hansard *v.* Robinson, 7 B. & C. 90.

[7] Tuttle *v.* Standish, 4 Allen (Mass.) 481. But *cf.* Savannah Nat'l Bank *v.* Haskins, 101 Mass. 370. *Cf.* also Smith *v.* Rockwell, 2 Hill (N. Y.) 482.

[8] Champion *v.* Terry, 3 B. & B. 295.

[9] Burgettstown Nat'l Bank *v.* Nill, 213 Pa. St. 456. See 3 L. R. A. (N. S.) 1079 n.

recent Michigan case, the indorser actually pays, since the transaction is then executed, the difficulty as to consideration drops out, and the indorser has no redress against the loser. *Rogers* v. *Detroit Savings Bank*, 110 N. W. Rep. 74. If, however, the indorser paid in ignorance of the facts, a court would doubtless reach the opposite result. The merit of the loser in such a case could hardly be said to be equal to that of the indorser, and therefore the doctrine of prior equities would have no application.

WHETHER A POWER TO SELL INCLUDES A POWER TO MORTGAGE. — Whether a power of sale be given to an agent, mortgagee, trustee, executor, or life tenant, the factor determining the extent of the power conferred should in all cases be the intent of the donor. If no absolute intent appears on the face of the power, the presumption may vary according to the character of the estate created, the purposes of the power, and the status of the donee.[1] If the donor retains an interest in the proceeds of the authorized sale, the fair presumption is that the estate was intended to be converted absolutely, and on this ground neither a power of attorney to an agent to sell nor a power of sale mortgage will authorize a mortgage or other encumbrance on the estate.[2] When land is conveyed or devised to trustees or executors, the old English rule that a mortgage, being a conditional sale, was impliedly authorized,[3] has been modified,[4] so that now the generally accepted rule is that in such cases a power of sale authorizes a mortgage only when the purpose is to pay off debts or charges on the land, or to raise a specific fund:[5] if the intention of the settlor or testator can be fulfilled as well or better by a mortgage, the mortgage is authorized. The presumption in favor of an actual sale seems justified; for the obvious expectation was that the *cestui* or estate should receive an adequate price for the land, and this may be defeated if a mortgage is given and foreclosed. If the trustee is to re-invest the proceeds of the sale on similar trusts, it is well settled that a mortgage is a breach of duty;[6] and although in some cases a mortgage may be for the benefit of the *cestui*, the courts have applied the rule strictly. If an absolute power of sale in fee is given to a life tenant, there can be no valid objection to a mortgage; the tenant has all the beneficial interest in the power and should have sole control over the exercise and interpretation of it.[7] The remainderman should not be heard to object that he receives an encumbered estate instead of none at all. But if the tenant is to take only a life interest in the proceeds of the sale, then the injury to the remainderman should be decisive;[2] for a vested remainder in an unencumbered estate should not without his consent be turned into a mere equity of redemption. The fiduciary situation of the life tenant in regard to the proceeds should be sufficient to invalidate a mortgage.

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[1] See McMillan *v.* Cox, 109 Ga. 42, 49.
[2] See Bloomer *v.* Waldron, 3 Hill (N. Y.) 361, 367.
[3] See Mills *v.* Banks, 3 P. Wms. 1, 9.
[4] See cases collected in Lewin, Trusts, 11 ed., 497.
[5] Loebenthal *v.* Raleigh, 36 N. J. Eq. 169; Stroughill *v.* Anstey, 1 De G. M. & G. 634. See 19 HARV. L. REV. 64.
[6] Patapsco Guano Co. *v.* Morrison, 2 Woods (U. S.) 395. See First Nat'l Bank *v.* Nat'l Broadway Bank, 156 N. Y. 459, 471. But *cf. In re* Lueft, 109 N. W. Rep. 652 (Wis.).
[7] Kent *v.* Morrison, 153 Mass. 137.